IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 761.

COLUMBIA HOSPITAL FOR WOMEN AND LYING-IN ASYLUM, a corporation, *Petitioner,*

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, *Respondent.*

BRIEF OF RESPONDENT, UNITED STATES FIDELITY AND GUARANTY COMPANY, IN OPPOSITION TO WRIT OF CERTIORARI.

Respondent's Counterstatement of the Case.

Petitioner filed a complaint in the United States District Court for the District of Columbia, to recover from Respondent herein, the sum of $18,975.47 upon a fidelity bond issued by the latter. (R. 2-3A) Respondent answered the action admitting a liability of $5,000, but asserting that it was not liable, under the terms of the bond, for a larger amount. (R. 4-5A). The District Court, in summary proceedings, entered judgment in Petitioner's favor for $5000 and adjudged that upon the admitted facts it was not en-

titled to recover a larger sum. (R. 26-27A). The Court of Appeals affirmed. (R. 37).

In 1948, Petitioner discovered that its bookkeeper, one Jenkins, had dishonestly taken from it during the years indicated the amounts following:

1945	$5,498.32
1946	3,975.47
1947	13,281.45
1948	17,555.90

(R. 3A)

As of March 17, 1942, Respondent issued to Petitioner a fidelity bond (R. 8-17A) insuring Petitioner for losses because of the dishonesty of its employees, including losses because of the dishonesty of its bookkeeper, not exceeding $5,000.00, (R. 18A) if such losses occurred during the term of the bond. The term of the bond was from March 7, 1942 and was to continue until 12:00 o'clock night "on the effective date of the cancellation of this bond." The paragraph defining the term of the bond provided that

> "* * * the payment of annual premiums during such term shall not render the amount of this bond cumulative from year to year." (R. 9A)

A method of cancellation by written notice by registered mail was provided. (R. 11-12A). A loss would be covered by the bond only if the

> "act causing such loss * * * be discovered and reported to the underwriter not later than two years after the cancellation of this bond as to such employee or after the cancellation of this bond as an entirety as provided in paragraph 7 * * *."

Petitioner paid premiums on an annual basis until 1946, when a rider (R. 25A) made possible a saving of premium by paying it on a three-year basis. The rider provided that it should be attached to and should become a part of the original bond. Petitioner says that the only effect of the

express language of the bond negativing cumulative liability from annual payment of premiums, is to limit it to a recovery of $3,975.47 for the year 1946. Respondent, on the other hand contended that the language of the bond is clear, that is, that the aggregate liability of the surety is $5,000 and that the mere payment of premiums on an annual basis did not result in a cumulative aggregate liability. Both the District Court and the Court of Appeals adopted this view.

The Decision of the Court Below Decides Local Law of the District of Columbia.

This Court will not review decisions of the United States Court of Appeals for the District of Columbia Circuit which merely declare the common law of the District. *District of Columbia* v. *Pace,* 320 U. S. 698, 702; 88 L. ed. 408, 410; *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285, 80 L. ed. 229, 232. Whatever may be the rule in other states, or the rule adopted by other United States Courts of Appeal, the case at bar involves only District of Columbia law. See, *Globe Indemnity Co.* v. *Wolcott & Lincoln, Inc.* (C.C.A. 8th), 152 F. 2d 545, 549. The contract upon which the action is based was executed and performed in the District of Columbia; and the jurisdiction of the United States District Court for the District of Columbia was invoked without any reference to the Federal jurisdiction of that court. (R. 2A).

The Decision of the Court Below Is Not in Conflict With Decisions of Other United States Courts of Appeal.

Review is sought by Petitioner because of an asserted conflict of the decision below with that of other Federal Courts. No such conflict exists. All of the cases cited by Petitioner from other Federal Courts and asserted to be in conflict with the decision below, are clearly distinguishable.

The bond upon which this action was based was for a single continuous term. The only basis for argument by Petitioner that there were separate annual insurance con-

tracts lies in the fact that insurance premiums were paid on an annual basis. But the bond, as already stated, contains an express, clear and unambiguous provision that the payment of premiums on an annual basis should not render the liability of Respondent cumulative from year to year. Therefore, neither the minority of cases holding that payment of premiums on an annual basis results in separate one-year term contracts, nor cases in which successive bonds for definite and fixed terms are construed, are in point. All of the cases cited by the Petitioner fall in one or both of these groups.

In *Florida Cent. & P. R. Co.* v. *American Surety Co. of New York* (C.C.A. 2d) 99 F. 674, it was held that the payment of annual premiums, without any provision in the bond to express a contrary intent, will be construed as a separate insurance contract from year to year. There was no provision in the bond expressing a contrary intent.

In *Proctor Coal Co.* v. *United States Fidelity and Guaranty Co.*, 124 F. 424, the Court (Circ. Ct., N. D. Ga.) held that the bond was for two separate annual contracts. Neither the bond nor the renewal agreement contained any provision that the payment of annual premiums should not render the amount of the liability of the surety cumulative.

In *Maryland Casualty Co.* v. *First National Bank of Montgomery, Ala.*, (C.C.A. 5th) 246 F. 892 (certiorari denied, 246 U. S. 670; 62 L. ed. 931) there were a series of bonds for fixed terms, and the terms were not merely from year to year. There was no expression of intent by the parties that the two contracts should not be construed as separate and distinct ones. The court acknowledges that the case is to be distinguished from such circumstances as those in the case at bar. At page 899, the court said:

> "Rulings made in cases involving contracts which contained stipulations for renewals and such provisions as one stating that the named amount of insurance was to cover losses occurring during the continuance of the bond or any renewal thereof, *or one stating that the liability of the insurer should not be cumula-*

tive, or one stating that the liability should not be for more than a stated sum, whether the loss occurred during the term of the policy or bond or a continuance thereof, or other similar provision, are not applicable to the facts of the instant case. As above indicated, the contract made by the bond with the rider attached made no provision for a renewal or extension of the liability it imposed and contained no provision similar to those just mentioned. * * *." (Emphasis supplied)

In *Maryland Casualty Company* v. *Tulsa Industrial Loan and Investment Co.,* (C.C.A. 10th) 83 F. 2d 14, the bonds contained no such provision as in the case at bar, and the opinion of the court affirming the judgment for a sum greater than the maximum amount of one of the two bonds was based upon an interpretation of the specific language of the bonds in question. The points for which Petitioner contends were not involved, and were not discussed by the court.

In *Aetna Casualty & Surety Co.* v. *Commercial State Bank of Rantoul,* (D.C. E.D. Ill.) 13 F. 2d 474 (rev., C.C.A. 7th, 19 F. 2d 969) the district court held that the payment of annual premiums alone rendered the surety liable as if upon a separate insurance policy written for each successive year. The distinction between that case and this one was recognized in the following language (p. 476):

> "Courts in which an opposite conclusion has been reached have grounded their decisions upon a finding that the parties by their contract evidenced an intention to restrict the liability to one penalty without regard to the number of premiums paid. The court has discovered nothing in this record to warrant such finding."

The appellate court, in reversing, found it unnecessary to pass on the question as to whether there was a single or triple liability under the surety's obligation. (19 F. 2d 974).

Globe Indemnity Co. v. *Wolcott & Lincoln, Inc.,* (C.C.A. 8th) 152 F. 2d 545, involved the construction of two sepa-

rate and distinct bonds, for fixed and definite terms. While the second bond contained a provision that the liability of the surety under the first bond and the second should not be cumulative in amounts, the court based its opinion upon a construction of other language indicating that the provision against cumulative liability only applied to losses which, but for the second bond, could not have been recovered at all because of the running of the period of limitations. The key words construed were "as extended by this rider." Furthermore, the opinion indicates that the court considered that it was deciding, and was bound by, Missouri law.

In *United States* v. *American Surety Co. of New York*, (C.C.A. 2d) 172 F. 2d 135, a surety was held liable as if upon separate annual contracts of insurance, where premiums were paid annually, and where there was no provision in the bond that the annual payment of premiums should not be construed to give cumulative effect thereto. The court, in its opinion, at page 138, recognized the distinction:

> "Turning to the cases, those which contain language rather clearly negativing cumulative liability are not in point. * * * ."

The only case which is on all-fours with the case at bar is *New York Casualty Co.* v. *Ford* (C.C.A. 5th), 145 F. 2d 599. There, in a bond substantially identical with the bond here, and where there was an express provision that the payment of annual premiums during the term of the bond should not render the amount of the bond cumulative from year to year, the court held that the payment of annual premiums did not effect a cumulative liability on the part of the surety. Far from conflicting with the decisions of the court below, the case is wholly in conformity with it.

Conclusion.

The decisions below were right. They do not conflict with decisions in other circuits. They are based upon the express language of the bond, and should not be disturbed.

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